2001

A. Paul Schwenke v. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the matter of:	:	
	:	BRIEF OF APPELLANT
A. PAUL SCHWENKE,	:	
Petitioner/Appellant.	:	Appellate No. 20011025-SC
	:	Case No. 010907939

PETITION FOR REVIEW OF THE ORDER DENYING APPELLANT'S APPLICATION FOR REINSTATEMENT TO MEMBERSHIP IN THE UTAH STATE BAR.

The Court below:

Honorable Frank G. Noel
District Judge
Third District Court
Salt Lake County

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DESIGNATION OF THE PARTIES

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STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction in this matter pursuant to Utah Code Ann. §78-2-2 and Article VIII, Section 3.

STATEMENT OF THE ISSUES PRESENTED

(1) Did the district court err in interpreting the mandatory provision of Rule 25(f), as discretionary? The rule is restated here as follows: "[w]ithin 60 days after receiving a respondent's petition for reinstatement or readmission, OPC counsel shall either: (1) advise the respondent and the district court that OPC counsel will stipulate to the respondent's reinstatement or readmission; or (2) file a written objection to the petition" Similarly, did the district court err in treating as discretionary the mandatory provision of Rule 25(g) that "district court shall, within 90 days of the filing of the petition" hold a hearing on the petition if an objection was timely filed by OPC. The standard of appellate review of the legal question involving statutory interpretation is correction of error without any deference to the district court. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Additionally, under the Supreme Court's constitutional charge to supervise the admission, the practice of law, and discipline of lawyers, the standard is for correctness of the actions taken by the district court as agent of the Supreme Court. *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). **R. 528 - 541.**

(2) Did the district court err in finding as a matter of law that the time for filing of the Objection by OPC to the Petition starts running from the time the Petition was filed rather than from the time of receipt of a copy of the Petition by the OPC? Additionally, did the district court err in finding that the receipt of a copy of the Petition by the common receptionist at the Law and Justice Center who delivered the copy of the Petition to the attorney for the Bar's Admission the same day, June 29, 2001, was not effective

until the Bar Admission's attorney deliver the same to the OPC two days later, July 2, 2001? These are questions of law the Supreme Court decides without any deference to the district court. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Additionally, under the Supreme Court's constitutional charge to supervise the admission, the practice of law, and discipline of lawyers, the standard is for correctness of the actions taken by the district court as agent of the Supreme Court. *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). **R. 749-756.**

(3) Is the Utah State Bar's ("Bar") wrongful imposition of Rules 14 and 6-1 of the Rules of Admissions to preclude Petitioner/Appellant ("Appellant") from taking the July 2001 Bar Examination and the Multi state Professional Responsibility Examination ("Bar exams") good and sufficient reason for the district court to abate the requirement of taking and passing said examinations as provided for under Rule 25, Rules of Lawyer Discipline and Disability ("RLDD")? This is a question of law the Supreme Court decides without any deference to the district court. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Additionally, under the Supreme Court's constitutional charge to supervise the admission, the practice of law, and discipline of lawyers, the standard is for correctness of the actions taken by the district court as agent of the Supreme Court. *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). **R. 537-540.**

(4) Is the Character and Fitness Committee's ("committee") wrongful application of the broad standard under Rules 14 and 6-1 good and sufficient reason for the district court to disregard the recommendation of the Committee and abate this requirement as provided for under Rule 25, RLDD? This is a question of law the Supreme Court decides without any deference to the district court. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Additionally, under the Supreme Court's constitutional charge to supervise the admission, the practice of law, and discipline of

lawyers, the standard is for correctness of the actions taken by the district court as agent of the Supreme Court. *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). **R. 534-537.**

(5) Does the Bar's imposition of Rule 14 and Rule 6-1, Rules of Admissions, instead of Rule 25, RLDD, a violation of Appellant's Equal Protection Rights and Due Process Rights as guaranteed under the United States Constitution and Utah Constitution that Appellant had been subjected to a different admissions procedure than from other similarly situated applicants; and that Appellant was denied due process when he was subjected to a higher standard for ethical qualification? This is a question of law for the Supreme Court to decide for correctness. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *West Valley City v. Roberts*, 993 P.2d 252 (UT App. 1999). Additionally, under the Supreme Court's constitutional charge to supervise the admission, the practice of law, and discipline of lawyers, the standard is for correctness of the actions taken by the district court as agent of the Supreme Court. *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). This issue was not specifically raised below; however, the issue is clearly present under the undisputed procedural facts and the fact that Appellant is a member of a protected class. This is a significant constitutional questions that affects or jeopardizes Appellant's liberty and property rights.

(6) Does the Utah lawyer supervision and disciplinary procedure violate the constitutional mandate for separation of power; and this violation in turn violate the Equal Protection rights of the Appellant in particular and Utah licensed lawyers in general in that other Utah licensed professionals are protected from the whim of one department of state government through a procedure involving participation by all three separate departments (Executive, Judiciary and Legislative), while lawyer supervision and discipline is limited to one department, the judiciary? This is a question of law to be

decided for correctness. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *West Valley City v. Roberts*, 993 P.2d 252 (UT App. 1999); *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). This issue was not specifically raised below; however, the issue is clearly present under the undisputed procedural facts and the fact that Appellant is a member of a protected class. This issue is a significant constitutional question that affects or jeopardizes Appellant's liberty and property rights.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS DETERMINATIVE AND/OR OF CENTRAL IMPORTANCE TO THE APPEAL.

1. Rule 25. Reinstatement following a suspension of more than six months; readmission.

(a) Generally. A respondent suspended for more than six months or a disbarred respondent shall be reinstated or readmitted only upon order of the district court. No respondent may petition for reinstatement until three months before the period for suspension has expired. No respondent may petition for readmission until five years after the effective date of disbarment. A respondent who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the effective date of the interim suspension.

(b) Petition. A petition for reinstatement or readmission shall be verified, filed with the district court, and shall specify with particularity the manner in which the respondent meets each of the criteria specified in paragraph (e) or, if not, why there is otherwise good and sufficient reason for reinstatement or readmission. Unless abated by the district court, the petition must be accompanied by an advance cost deposit in the amount set from time to time by the Board of Commissioners to cover anticipated costs of the proceeding. Prior to or as part of the respondent's petition, the respondent may request modification or abatement of conditions of discipline, reinstatement or readmission.

c) Service of petition. The respondent shall serve a copy of the petition upon OPC counsel.

(d) Publication of notice of petition. At the time a respondent files a petition for reinstatement or readmission, OPC counsel shall publish a notice of the petition in the Utah Bar Journal. The notice shall inform members of the Bar about the application for reinstatement or readmission, and shall request that any individuals file notice of their opposition or concurrence with the district court within 30 days of the date of publication.

In addition, OPC counsel shall notify each complainant in the disciplinary proceeding that led to the respondent's suspension or disbarment that the respondent is applying for reinstatement or readmission, and shall inform each complainant that the complainant has 30 days from the date of mailing to raise objections to or to support the respondent's petition. Notice shall be mailed to the last known address of each complainant in OPC counsel's records.

(e) Criteria for reinstatement and readmission. A respondent may be reinstated or readmitted only if the respondent meets each of the following criteria, or, if not, presents good and sufficient reason why the respondent should nevertheless be reinstated or readmitted:

(1) The respondent has fully complied with the terms and conditions of all prior disciplinary orders except to the extent they are abated by the district court.

(2) The respondent has not engaged nor attempted to engage in the unauthorized practice of law during the period of suspension or disbarment.

(3) If the respondent was suffering from a physical or mental disability or impairment which was a causative factor of the respondent's misconduct, including substance abuse, the disability or impairment has been removed. Where substance abuse was a causative factor in the respondent's misconduct, the respondent shall not be reinstated or readmitted unless:

(A) the respondent has recovered from the substance abuse as demonstrated by a meaningful and sustained period of successful rehabilitation;

(B) the respondent has abstained from the use of the abused substance and the unlawful use of controlled substances for the preceding six months; and

(C) the respondent is likely to continue to abstain from the substance abused and the unlawful use of controlled substances.

(4) Notwithstanding the conduct for which the respondent was disciplined, the respondent has the requisite honesty and integrity to practice law. In readmission cases, the respondent must appear before the Bar's Character and Fitness Committee and cooperate in its investigation of the respondent. A copy of the Character and Fitness Committee's report and recommendation shall be forwarded to the district court assigned to the petition.

(5) The respondent has kept informed about recent developments in the law and is competent to practice.

(6) In cases of suspensions for one year or more, the respondent shall be required to pass the Multi state Professional Responsibility Examination.

(7) In all cases of disbarment, the respondent shall be required to pass the student applicant bar examination and the Multi state Professional Responsibility Examination.

(f) Review of petition. Within 60 days after receiving a respondent's petition for reinstatement or readmission, OPC counsel shall either:

(1) advise the respondent and the district court that OPC counsel will stipulate to the respondent's reinstatement or readmission; or

(2) file a written objection to the petition.

(g) Hearing; report. If an objection is filed by OPC counsel, the district court shall, within 90 days of the filing of the petition, conduct a hearing at which the respondent shall have the burden of demonstrating by a preponderance of the evidence that the respondent has met each of the criteria in paragraph (e) or, if not, that there is good and sufficient reason why the respondent should nevertheless be reinstated or readmitted. The district court shall enter its findings and order. If no objection is filed by OPC counsel, the district court shall review the petition without a hearing and enter its findings and order.

(h) Successive petitions. Unless otherwise ordered by the district court, no respondent shall apply for reinstatement or readmission within one year following an adverse judgment upon a petition for reinstatement or readmission.

(i) Conditions of reinstatement or readmission. The district court may impose conditions on a respondent's reinstatement or readmission if the respondent has met the burden of proof justifying reinstatement or readmission, but the district court reasonably believes that further precautions should be taken to ensure that the public will be protected upon the respondent's return to practice.

(j) Reciprocal reinstatement or readmission. If a respondent has been suspended or disbarred solely on the basis of discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, and if the respondent is later reinstated or readmitted by that court, jurisdiction or regulatory body, the respondent may petition for reciprocal reinstatement or readmission in this state. The respondent shall file with the district court and serve upon OPC counsel a petition for reciprocal reinstatement or readmission, as the case may be. The petition shall include a certified or otherwise authenticated copy of the order of reinstatement or readmission from the other court, jurisdiction or regulatory body. Within 20 days of service of the petition, OPC counsel

may file an objection thereto based solely upon substantial procedural irregularities. If an objection is filed, the district court shall hold a hearing and enter its findings and order. If no objection is filed, the district court shall enter its order based upon the petition.

2. Article V, Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

3. Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

4. Article I, Section 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

5. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

1. Nature of the case, proceeding and disposition below.

The case arose from Appellant's application for reinstatement to membership in the Utah State Bar. Appellant first inquired of the Bar as to what he should do to be readmitted to membership in the Bar. The Bar send Appellant an application package which he completed and timely submitted. **R. 44- 71, 151-171, 544-575.** The Character and committee denied the application resulting in Appellant being precluded from taking the Bar exams. **R. 72-73, 577-578.** The Appellant requested a hearing and one was held before the committee. While preparing for the hearing, Appellant discovered that he had been subjected to the wrong procedure for readmission in that the proper procedure was pursuant to Rule 25, RLDD. Appellant appeared at the committee hearing and objected on the ground that Rule 25 RLDD controls his application for reinstatement. The Appellant, however, stayed and participated in the hearing, answering committee inquiries to comply with Rule 25 RLDD requirement for him to appear before the same committee and answer questions. **R. 582-595.** Following the hearing Appellant filed his Verified Petition for Reinstatement pursuant to Rule 25 RLDD. **R. 1-37.** Pursuant to the same rule, Appellant requested the Bar to allow him to take the Bar exams. The Bar

refused and the Appellant sought a Writ of Mandamus to the Bar from the district court. **R. 38-73.** The district court denied on the ground that Rules 14 and 6-1 of the Bar Rules of Admissions govern Appellant's application. **R. 124-125, 177-179.** Appellant sought a Writ of Mandamus from this Court, and this Court denied the Writ but acknowledged that Rule 25 RLDD controls Appellant's application for reinstatement. **R. 614.**

In the meantime, Rule 25, RLDD time provisions were running on Appellant's petition. The 60 days limitation for the Bar to file an objection ran before an objection was filed. The 90 days for a hearing also ran. The hearing was finally set 23 days out of time. At the hearing, Appellant raised the issues of the untimely objection and hearing. **R. 749-756.** Furthermore, since Appellant was wrongfully precluded from taking the Bar exams, and the committee applied the wrong rule in recommending against the petition, that these requirements should be abated as provided for under Rule 25(b). Finally, the Appellant urged the district court, under the circumstances, Appellant was entitled, consistent with the mandate of Rule 25g ["court shall review the petition without a hearing and enter its findings and order"], for the district court to review his petition without a hearing. **R. 538-539.** Alternatively, Appellant suggested to the district court to dismiss the petition so Appellant can appeal to this Court the issues as raised in connection with the operation of Rule 25 RLDD. The district court chose to dismiss or deny the petition and this appeal ensued.

2. Statement of Facts relevant to the issues present for review

(1) In or about February, 2001, Appellant inquired of the Bar about the

procedure for reinstatement. The Bar provided Appellant with an admissions package that conforms to Rule 14 and 6-1 of the Rules for Admission.[1] **R. 44-71.**

(2). On or about April 3, 2001, Appellant completed the Application form that was a part of the admissions package and timely filed the Application with all required attachments and paid the application fee. Id.

(3). On or about May 29, 2001, Appellant received a letter from the Bar denying his application to sit for the July, 2001 bar examination. The letter also advised Appellant that he could request a formal hearing. Appellant immediately requested a hearing. **R. 72-73.**

(4). On or about June 24, 2001, Appellant received a copy of the Confidential Character and Fitness Report. **R. 529.**

(5). The formal hearing on the committee's denial of Appellant's application to take the bar examination was set for June 26, 2001. **R-580.**

(6). While preparing for the hearing, Appellant discovered that he had been subjected to an erroneous process. That Rule 25, RLDD governs his reinstatement. Under Rule 25, the district court, not the Bar, has exclusive jurisdiction over the entire reinstatement process. Accordingly, Appellant appeared at the hearing and objected that the committee does not have the right under Rule 25, to decide whether or not Appellant

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[1] At the time, Appellant was not aware that Rule 25, Rules of Lawyer Discipline and Disability governs his application for readmission rather then Rule 14 and 6-1 of Rules for Admission.

can take the bar examination. The hearing proceeded nonetheless pursuant to Rule 14 and 6-1 of the Rules for Admissions. Under Rule 14, unless the committee is satisfied that the Appellant has met the broad subjective standard of Rule 6-1, the Appellant would be denied the opportunity to take the July 2001 bar examination. **R. 582-595.**

(7). On June 29, 2001, pursuant to Rule 25 Appellant hand-delivered, and the Utah State Bar received, a copy of the Verified Petition for Reinstatement ("petition"). **R. 1-37, 597.**

(8). On July 3, 2001, Appellant filed with the Fourth District Court, the petition and a Petition for an Extraordinary Writ to the Bar compelling it to allow Appellant to take the July 2001 bar examination. On July 19, 2001, the hearing on the Petition for an Extra Ordinary Writ was heard before honorable Donald J. Eyre, district judge of the Fourth District Court, Fillmore, Utah, and the court denied the petition on the ground that Rules 14 and 6-1 was controlling. **R. 124-125, 177-179.**

(9). On July 20, 2001, Appellant filed an Emergency Petition to a Single Justice of the Supreme Court for an Extraordinary Writ to the Bar to compel it to allow Appellant to take the July 2001 bar exams. **R. 603-612.**

(10). On July 23, 2001, Honorable Richard C. Howe, Chief Justice, issued the following Order:

> The specific relief requested by Petitioner A. Paul Schwenke, an order requiring the Utah State Bar to permit him to sit for the July 2001 Bar Examination, is denied. The court will consider his petition in relation to the requirement of sitting for the Bar Examination pursuant to Rule 25 of the Rules of

> Lawyer Discipline and Disability and issue an order in due course. (Emphasis added). **R. 614.**

(11). July 25 and 26, 2001, the July 2001 bar examination was administered. The Bar would not allow Appellant to take the bar examination. **R. 531.**

(12). On August 20, 2001, Honorable Justice Matthew B. Durrant, issued the following Order

> The petition for an extraordinary writ is dismissed. Petitioner should proceed in the district court pursuant to the dictates of rule 25 of the Rules of Lawyer Discipline and Disability. (Emphasis added). **R. 617-619.**

(13). On or about August 22, 2001, Appellant was served with a copy of the belated committee's Findings of Fact, Conclusions of Law and Recommendation ("report"). **R. 621-631.**

(14). On or about August 29, 2001, the Bar served its discovery requests.

(15). On August 30, 2001 the Bar filed its Memorandum in Opposition to the Verified Petition for Reinstatement, outside of the 60 days. **R. 637-646.**

(16). On October 12, 2001, the Bar served its Motion to Compel.

(17). At the telephone scheduling conference on October 17, 2001 the court set the matter for a hearing on October 24, 2001. The court also allowed dispositive motions to be filed and to be heard on the morning of the hearing.

(18). Appellant filed a Motion to Strike the Bar's Objection to the petition on the ground that it was untimely. The Appellant also moved to strike the Recommendation of the committee on the ground that committee hearing was conducted

under the erroneous Rule 14 and standard of Rule 6-1 which are broad scope as opposed to the limited scope of Rule 25. The Appellant also moved to strike all the pending discovery requests because the normal discovery procedure are not appropriate for a shortened and summary nature of a Reinstatement proceeding. **R. 526-633.**

(19). The Appellant's motions and the Bar's motions to compel and in limine were argued to the court on the morning of the hearing. The court denied the Bar's motions and the Appellant's motions except the motion to strike the discovery requests. **R. 749-756.**

(20). At the commencement of Appellant's case, the Appellant declined to present evidence and requested for the court to rule on the petition without a hearing or to dismiss so Appellant could present his case to the Supreme Court. The court dismissed the case and this appeal followed. *Id.*

(21). The facts before the court through the petition and supporting documents are as follows:

(a) The Appellant has fully complied with the terms and conditions of all prior disciplinary order.

(b) The Appellant had been disbarred for eight years.

(c) The Appellant had complied with the Restitution order through an execution sale of his home.

(d) Appellant has not engaged nor attempted to engage in the unauthorized practice of law during the period of disbarment.

(e) Appellant had kept abreast of legal developments through subscriptions and consultation with lawyers.

(f) Appellant's disbarment was not the result of suffering from physical or mental disability or impairment, including substance abuse.

(h) The Appellant, notwithstanding the conduct he was disbarred for, has the requisite "honesty and integrity" to practice law. The committee report should be stricken because it was prepared under the wrong standard of Rule 14 and 6-1 of the Rules of Admissions.

(i) Appellant appeared before the Bar's committee cooperated with its investigation.

(j) Appellant was wrongfully precluded by the Bar from taking the July 2001 Bar Examination and the Multi state Professional Responsibility Examination. For this reason the court should abate the examination requirements. **R. 1-37.**

SUMMARY OF ARGUMENTS

Rule 25, RLDD is a special proceeding for the benefit of the lawyer suspended over six months or disbarred, to expedite his or her application for membership in the Bar. Accordingly, the use in Rule 25 of the imperative "shall" means the time limits are mandatory and strictly applied. Here, the OPC missed the 60 day deadline to file an

objection to the Petition and the court missed the 90 day deadline to hold a hearing. Because OPC and the district court missed the deadlines, the option provided in Rule 25 for the review and ruling on the Petition without a hearing is the proper remedy.

Because the Bar precluded Appellant from taking the Bar exams as a result of the Bar insistence on imposing the wrong rule, and the committee's application of the wrong procedure and standard to Appellant's application should be good and sufficient grounds for abating the examination and the committee recommendation criteria for admission.

Rule 25 governs applications for reinstatement for lawyers suspended for over six months and disbarred lawyers. Appellant is a member of this class. The Bar treated Appellant differently from this class of lawyers when he was singled out and subjected to a procedure and standard different from Rule 25. Appellant is also a member of a race protected class. The Bar's disparate treatment of Appellant is a violation of his Equal Protection and Due Process rights.

Finally, the Supreme Court exercise of the three powers of govern in regulating lawyers is a violation of the separation of power's Article of the Utah Constitution and United States Constitution. Since other professionals licensed by the state of Utah are regulated by all three department of the state government, the different treatment of the lawyers violate their equal protection rights under both the Utah and United States Constitutions.

ARGUMENT

1. **The district court erred in disregarding the mandatory nature of Rule 25(f) and 25(g), RLDD.**

The Appellant served his Petition for Reinstatement upon the Office of Professional Conduct ("OPC") on June 29, 2002, by hand-delivering a copy of the Petition to the receptionist at the Bar building at 645 South 200 East, Salt Lake City. On August 30, 2002, 62 days since receipt of a copy of the Petition, the OPC filed and served a Memorandum in Opposition to the Appellant's petition for reinstatement. The controlling rule provides that,

> Within 60 days after receiving a respondent's petition for reinstatement or readmission, OPC counsel shall either: (1) advise the respondent and the district court that OPC counsel will stipulate to the respondent's reinstatement or readmission; or (2) file a written objection to the petition." Rule 25(f), *Rules of Lawyer Discipline and Disability* ("RLDD").

The district court commented that some statutes use the term "shall" but they are often interpreted to be discretionary, inferring that this rule is one that is really discretionary rather than mandatory.

If indeed the term "shall" as used in this rule and in this context is meant to be discretionary, why didn't the drafters of the provision use terms that are not mandatory or imperative such as "may". Perhaps it was because the provision meant what it said, that the 60 days must be adhered to. The mandatory meaning of the term "shall" is also consistent with the drafters of the rule's proclamation that "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of

legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." Preamble: Lawyer's Responsibility, *Rules of Professional Conduct* (Emphasis added). Accordingly, as used in the Rules of Professional Conduct, "shall" or "shall not" are imperatives that must be complied with.

A strict adherence to the time limitations is also consistent with the nature and special circumstances of a Rule 25, RLDD proceeding. The drafters of the rule are apparently cognizant of the fact that a lawyer suspended for over six months or disbarred for over five years has been deprived of practicing his or her chosen profession for sometime. The underpinnings of Rule 25, RLDD, is clearly to provide a special proceeding to accord the disbarred lawyer an expedited means for regaining membership in the Bar. If fact, the entire proceedings could conceivably be concluded in 90 days or a few days thereafter. Indeed, the OPC is required to file an objection in 60 days and only when it has timely filed an objection will there be a hearing. The hearing must be conducted within 90 days from the date of filing of the Petition. If there is no objection, the district court could conceivably rule in 60 days based on the Verified Petition. The statement of this shortened or expedited proceeding is clear and unambiguous under sub-paragraph (g) which provides as follows:

> (g) Hearing; report. If an objection is filed by OPC counsel, the district court shall, within 90 days of the filing of the petition, conduct a hearing at which the respondent shall have the burden of demonstrating by a preponderance of the evidence that the respondent has met each of the criteria in paragraph (e) or, if not, that there is good and sufficient reason why the respondent should nevertheless be reinstated

> or readmitted. The district court shall enter its findings and order. If no objection is filed by OPC counsel, the district court shall review the petition without a hearing and enter its findings and order. Rule 25(g) RLDD (Emphasis added).

Compared to the usual or typical civil case, Rule 25 RLDD is clearly an expedited or shortened proceeding for the benefit of the applicant for reinstatement. Against the purpose of the special Rule 25 proceeding, it follows that the use of the imperative term "shall" was intended to impose strict adherence to the time limitations.

The Petition was filed on July 3, 2001. The latest a hearing could have been timely under Rule 25, assuming an objection was timely filed, would have been October 1, 2001. The hearing based on OPC's untimely filed Memorandum in Opposition to the Petition for Reinstatement was held on October 24, 2001. Accordingly, the hearing was held 113 days from the date the Petition was filed which is 23 days out of time. The hearing accordingly violated the 90 days mandate of Rule 25(g). The Appellant has a right under Rule 25 to an expedited proceeding for reinstatement to membership in the Bar. The OPC violated that right when it failed to comply with the mandatory time limitations imposed under Rule 25. The district court violated that right when it failed to set a hearing within 90 days from the date of filing of the petition. The Appellant in the interest of justice and fair play should not to be penalized for OPC and the district court's failure to comply with the rules. Accordingly, Appellant respectfully urges the Court to immediately reverse the district court and remand this matter for the district court to "review the petition without a hearing and enter its findings and order.

2. **The district court erred in finding, as a matter of law, that the time for OPC to file an objection to the Petition starts running from the time the Petition was filed rather than when the OPC received a copy of the Petition.**

Rule 25, RLDD in pertinent part provides that "Within 60 days after receiving a respondent's petition for reinstatement or readmission, OPC counsel shall either: (1) advise the respondent and the district court that OPC counsel will stipulate to the respondent's reinstatement or readmission; or (2) file a written objection to the petition." Rule 25(f). (Emphasis added). The operative act is not the filing of the Petition but the receiving by OPC of a copy of the Petition. The copy of the Petition was hand-delivered to the OPC at the Utah Law & Justice Center, 645 South 200 East, Salt Lake City, and received by OPC on June 29, 2001. **R. 5.** The district court's holding was in err because the meaning of the provision requires receipt by OPC as opposed to filing of the Petition as the operative event for the 60 day time limitation to run. Appellant clearly complied with the rule and this Court is urged to apply the plain meaning of the rule and reverse the district court's erroneous holding.

3. **The district court erred in holding, as a matter of law, that the service of a copy of the Petition upon the common receptionist at the Law and Justice center who deliver the copy of the petition to the attorney for the Bar's Admissions office was not effective until said Bar Admission's attorney deliver the copy of the Petition to the Disciplinary Counsel two or three days later?**

The district court adopted the OPC's assertion that the date it was served or

received a copy of the Petition was July 1, 2001, the date that OPC admitted that it received a copy of the Petition from the attorney for the Admission Section or department of the Bar, notwithstanding the common receptionist, by affidavit, admitted to have received a copy of the Petition on July 29, 2001. The OPC claimed that service on the common receptionist at the Law and Justice Center is not service on OPC. Additionally, receipt by the attorney for the Bar Admission department of the Bar is not the same as receipt by the OPC, another department of the Bar.

The court erred because the copy of the Petition was admittedly received by the common receptionist, and the same was admittedly received by the Bar's attorney for the Admission's department, the same day, June 29, 2002. To require more, as the district court did here, creates an unfair and unjustified burden on litigants in opposition to the Bar. Moreover, to affirm the district court's acceptance of the different department argument is tantamount to providing the Bar special treatment and opportunity for abuse. Under this view, the Bar can literally avoid service of any process it doesn't like by simply asserting that the process was served upon the wrong department. Accordingly, the Court is respectfully urged to hold that service upon one section or department of the Bar is service upon all departments, and further finds as a matter of law that the OPC received a copy of the Petition on June 29, 2001, and had until August 28, 2001 to file an objection to the Petition. Accordingly, the filing of the Memorandum in Opposition to the Petition on August 30, 2001 was untimely and the objection to Appellant's Petitioner for reinstatement must be stricken. Without a timely objection, the district court should

be ordered, pursuant to Rule 25(g), to "review the petition without a hearing and enter its findings and order".

4. **The Bar's wrongful imposition of Rules 14 and 6-1 of Rules of Admissions to preclude Appellant from taking the July 2001 Bar Examination and the Multi state Professional Responsibility Examination is good and sufficient reason for the district court to abate the requirement of taking and passing said examinations.**

Rule 25, RLDD provides in pertinent parts that "[a] respondent may be reinstated or readmitted only if the respondent meets each of the following criteria, or, if not, presents good and sufficient reason why the respondent should nevertheless be reinstated or readmitted;" Rule 25(e), RLDD. It is unlikely that any applicant to membership in the Bar has gone through so much hassle to take the bar exams as did the Appellant here. Appellant was precluded, not by any fault of his, but by the Bar's insistence that Rule 14 and 6-1 of the Admissions Rules apply to his application. This Court has affirmed that Rule 25, RLDD is the proper procedure for the Appellant to seek reinstatement. The Bar, who is charged with knowing the right procedure, has clearly made a mistake in this case. The Bar made a mistake but it is the Appellant that is and has been penalized for that mistake. If the Bar had followed the proper procedure under Rule 25, RLDD, the Appellant would have taken and passed the bar exams. Justice and fair play demands that Appellant should not be penalized for the Bar's mistake. Accordingly, the honorable Court is respectfully urged to hold as a matter of law, that the wrongful preclusion of Appellant by the Bar from taking the bar exams, is good and sufficient reason for the district court to abate the requirement for the Appellant to take and pass the bar exams.

5 **Is the committee's wrongful application of the broad standard under Rules 14 and 6-1 good and sufficient reason for the district court to disregard the recommendation of the committee.**

Preliminarily, the Court is respectively urged to give some consideration to the

sequence of events when the committee denied Appellant's application and opportunity to take the bar exams. On May 29, 2001, the committee pursuant to the procedure set forth under Rule 14, and the standard set forth under Rule 6-1, Rules for Admission, denied Appellant's application to take the July 2001 bar exams. The notice of this decision did not offer any basis or support for the committee's conclusions. Twenty one days later on June 20, 2001, Appellant received a copy of the Confidential Character and Fitness Report. Apparently, when the committee formed its conclusions on May 29, 2001, the investigation was either on going or had not started at all. That presents an important question. Did the committee reach its conclusion first, than conduct an investigation to support it? The court is respectfully urged to keep this question in mind while reviewing the committee's Findings and Conclusions. **R. 621-631.** The committee conducted its hearing pursuant to Rule 14 and 6-1 of the Rules of Admissions as opposed to Rule 25 RLDD. **R. 582-595.** The committee's ruling was expressly pursuant to the same Rules of Admissions. **R. 629.**

First of all, the report is the result of an investigation under Rule 14, and the standard set forth under Rule 6-1 of the Rules of Admission. That standard is stated in part as follows:

> [Does the] attorney's conduct . . . conform to the requirements of the law, both in professional service to clients and in the attorney's business and personal affairs. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. An applicant whose record manifests a significant deficiency in the honesty, trustworthiness, diligence, or reliability shall be denied admission. (Emphasis added). *Rule 6-1*, Rules for Admissions.

This standard is very broad and includes revisiting the conduct that resulted in the prior disbarment, any other conducts both within and without the legal profession and the petitioner's personal affairs. In contrast, the Rule 25 investigation is very limited and

focus only on conducts that demonstrate "honesty and integrity to practice law". Rule 25 provides in pertinent part as follows:

> Notwithstanding the conduct for which the respondent was disciplined, the respondent has the requisite honesty and integrity to practice law. (Emphasis added).

The clear scope of the rule begins with the conduct that Appellant was disbarred for. Appellant contends that "notwithstanding that conduct" means the committee's investigation does not consider that prior conduct and the circumstances surrounding the disciplinary proceeding that resulted in the disbarment. Under this standard, the committee is limited to investigating only conducts relevant to whether or not the Appellant has the requisite honesty and integrity to practice law. The report is expressly based on the broad scope of Rule 6-1 of the Rules of Admission. As a result, the committee's investigation dwelled mostly on matters clearly outside of a limited investigation under Rule 25. The committee focused a substantial part of the hearing on the conduct that was the subject of the prior disbarment. Because the committee focused on the prior disciplinary proceeding contrary to Rule 25, the committee was in fact prejudiced by it against Appellant. For example, rather than finding that a judgment of almost a $100,000.00 that was the basis of the restitution order was fully satisfied through an execution sale of Appellant's home in 1995, the committee instead concluded that Schwenke failed to pay Caren Serr.

Moreover, all the answers provided in response to the committee's questions were true to the best of Appellant's knowledge and belief. Indeed, the Appellant disclosed all of the negative information about him, his finances and his personal life. Instead of appreciating the honesty in the disclosure of negative information, the committee treated the negative information as a sign of a bad person that does not deserve to be reinstated. The committee did not like the fact that Appellant has tax problems and still owes taxes and has not filed taxes in the last few years. The committee did not like that Appellant is

involved in several law suits as both a plaintiff or a defendant and some of the law suits involve claims of fraud. The committee did not like that Appellant was arrested (but acquitted) for DUI three times. The committee did not like that Appellant had access to $1.5 million but failed to pay the restitution or the disputed taxes. Perhaps under Rule 6-1, these subjective considerations by the committee are applicable, but not under the objective standard of Rule 25. In total, the report is clearly the product of a committee prejudiced by the prior conduct that resulted in Appellant's disbarment and other conducts unacceptable to the committee. Accordingly, the Appellant respectfully urges the court to strike the report, and instead review the transcript of the hearing and the exhibits and enter independent findings free from prejudice.

6. **Does the Office of Admission's imposition of Rule 14 and Rule 6-1, Rules of Admissions, instead of Rule 25, RLDD, a violation of Appellant's Equal Protection Rights and Due Process Rights.**

(1) Equal Protection claim.

The Article I, section 24 of the Utah Constitution states: "[a]ll laws of a general nature shall have uniform operation.", and the United States Constitution amend. XIV, § 1 prohibits a state from enacting laws that deny "any person within its jurisdiction the equal protection of the laws". These constitutional provisions while dissimilar in language embody the same general principle that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan v. Walker*, 2002 UT 89 (Utah 2002) citing *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984); and *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 355-56 (Utah 1997). In this case, Appellant belong to a class of lawyers that have been suspended for longer than six months or have been disbarred. Rule 25, RLDD governs applications for reinstatement or readmission to membership in the Bar for this class of lawyers. The Appellant is a member of this class, yet the Bar singled out the

Appellant and forced him to comply with procedure and standard that is clearly different from the procedure and standard required of the rest of the class of lawyers. Appellant's right to equal protection under both the State and Federal constitutions has clearly been violated by the Bar's imposition of a different procedure and standard in his application for reinstatement.

(2) Due Process claim.

Article I, § 7 of the Constitution of Utah, states: "No person shall be deprived of life, liberty or property, without due process of law." Similarly, United States Constitution, amend. XIV, sec. 1 provides that no state shall deprive any person of property without due process of law. For this analysis, Appellant assumes that both the Utah and the United States due process provisions are identical in application. The first step in a due process analysis is a determination of whether a recognizable life, liberty or property right is at stake. If so, whether or not the circumstances show that the protect able right has been violated or the deprivation of the right was made without the required legal process. *Harper v. Summit County*, 963 P.2d 768, 348 Utah Adv. Rep. 7 (Utah App. 1998). Appellant has been deprived of his right to practice law. This right is well settled, recognized, and characterized as a right, "not a matter of grace and favor" *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-05, 10 L. Ed. 2d 224, 83 S. Ct. 1175 (1963) (quoting Ex parte Garland, 71 U.S. (4 Wall.) 333, 379, 18 L. Ed. 366 (1867)), but instead a "fundamental right". *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L. Ed. 2d 205, 105 S. Ct. 1272, 53 U.S.L.W. 4238, 4240 (U.S. 1985). Indeed, "[s]tate courts must afford attorneys due process rights before denying their admission to the state bar on the grounds of questionable moral character." See *Willner, supra* at 102-5. Accordingly, Appellant's right to practice law is a fundamental right protected by the due process clause of both the Utah and United States Constitutions.

The final inquiry is whether Appellant's fundamental right has been violated. Appellant respectfully urge the Court to find in the affirmative. The violation started with the denial on May 29, 2001 by the committee of Appellant's application for reinstatement before the committee's investigation started or completed. Indeed, the investigation took almost a month to complete, but after Appellant's application had already been denied. More importantly, the committee applied the erroneous Rule 14, and Rule 6-1, Rules of Admission procedure and standard when it denied Appellant's application. Moreover, the committee hearing and its final recommendation were also made and based on the same erroneous procedure and standard of the rules of admissions. Expanding the scope of the committee investigation to include Appellant's entire life history and including the events he had been punished for already; instead of the limited scope of inquiry under Rule 25 to ascertain if Appellant had the "honesty and integrity to practice law" is not only a disparate treatment in violation of equal protection but a clear violation of Appellant's right to due process.

7. **Does the State of Utah's scheme to regulate the practice of law violates the constitutional mandate for separation of power; and this violation in turn violates the Equal Protection rights of the Appellant in particular and Utah licensed lawyers in general?**

(1) Separation of Power.

Article V §1, Utah Constitution provides for separation of the three departments of government. The separation of governmental powers between the three departments of government; the Legislative, the Administrative and the Judiciary, as distinct and independent and free from the control of the other, was judicially recognized by a majority *Marbury v. Madison,* 1 Cranch 137, 2 L. Ed. 60. The separation of power issue has arisen primarily in connection with contests between departments. See for example; *Scott M. Matheson v. Miles 'Cap Perry*, 641 P.2d 674 (UT. 1982); *Gallivan, supra* at 89; and *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298 (1941). Appellant

has not found a case wherein an individual asserted a claim against the government under the separation of power clause. Nevertheless, there are numerous cases where the courts view the separation of power as "probably, the most important principle of government declaring and guaranteeing the liberties of the people." *Matheson, supra.* quoting *Searle v. Yensen*, 118 Neb. 835, 841, 226 N.W. 464, 466, 69 ALR. 257, 261 (1929). (Emphasis added). Justice Oaks concurring in *Matheson, supra*, also held that the purpose of the separation of powers is to restrain and regulates the exercise of government power "to protect individual liberties." (Emphasis added).

If indeed the separation of power provisions of the Utah and United States Constitutions are to protect individual liberties, it follows that the lack of it, takes away the protection of individual liberties. In other words, an individual subjected to the exercise of all the three powers of government in one department of the government is denied protection of his individual liberties. The Appellant is and has been subjected to a scheme to regulate the practice of law that clearly violates Article V §1 of the Utah Constitution. The Supreme Court exercises legislative power through it's rule making authority as authorized in Article VIII §4 of the Utah Constitution. The Supreme Court exercises administrative, including prosecutorial power, through its agent the Utah State Bar. The Supreme Court exercises judicial power through its agent the district court. Where is Appellant's protection of his individual liberties when he is subjected to the whim of one department of the government exercising all the governmental powers?

The clear answer is that there is no protection of individual liberties under the Supreme Court's scheme to regulate the practice of law. Appellant has first hand experience of the arbitrary and capricious nature of the present scheme. *In the matter of the Discipline of A. Paul Schwenke*, 849 P.2d 573 (Utah 1991), **R. 346-349**, Appellant challenged the validity of the service of process at his former office address while he was out of the state. Justice Howe found the service of process constitutionally defective. On

the very same facts, service of process at the same former office address, Justice Durham found constitutionally valid service. *See In re A. Paul Schwenke,* 865 P.2d 1350 (Utah 1993). **R. 342-345.** The difference in the two cases was an affidavit in the latter case that made its way into the record two weeks after the appeal was filed. Appellant's efforts to point out the fraud on the Court fell on death ears. How can the Supreme Court bring fraud charges on itself for its agent's conduct? To get rid of Appellant's claim, Chief Justice Zimmerman appointed his friend Ron Yengish, who around the same time was a co-actor with Justice Zimmerman in a play at the University of Utah, to investigate the allegations. Mr. Yengish concluded that there was no fraud because it would not have made any difference if the document was back dated.

The instant case is another example. The Supreme Court's agent, the Utah State Bar was bound and determined to exclude Appellant from membership in the Bar. The agent imposed a clearly erroneous procedure and standard in order to accomplish its aim. The Supreme Court's agent, the district court, accepted without question, it's sister agent, the Utah State Bar's claim that Rule 14 and 6-1, Rules of Admissions governs Appellant's application for reinstatement. The Supreme Court while acknowledging that the proper rule was Rule 25, RLDD, instead of the rules advocated by the Bar, refused to correct the Bar's error.

(2) Equal Protection.

The protection of individual liberties through the exercise of governmental powers by three separate and independent departments is denied to Appellant, in particular, and lawyers licensed to practice law in Utah, in general. All other professionals licensed by the State of Utah operate and practice their respective trades and professions with the benefits and protection of personal liberties accorded under the separation of power provision of the Utah Constitution. Medical doctors, while most belong to medical associations, are licensed and regulated by the Administrative department, according to

laws enacted by the Legislature or rules promulgated by agencies with delegated rule making powers, and when any laws or rules are at issue, could turn to the independent judiciary for interpretation and resolution of the issues. All licensed trade workers and professionals are governed under a similar scheme except lawyers. United States Constitution amend. XIV, § 1 prohibits a state from enacting laws that deny "any person within its jurisdiction the equal protection of the laws". Here, lawyers are being treated different and are denied protection of their individual liberties by being subjected to a regulatory scheme where all the powers of government reside in the one entity regulating them.

The Supreme Court justifies its hold on the three powers of government as necessary for the self-governing of lawyers because they are in a unique relationship to the processes of government and law enforcement. Self-regulation is suppose to help maintain the legal profession's independence from government domination and in preserving government under law. This belief is founded on the rationale that a profession whose members are not dependent on the government for the right to practice is more ready and willing to challenge the government. While these goals and aspirations are helpful in maintaining the independence of the judiciary in relation to other departments of the government, none addresses the loss or the lack of protection of individual liberties of the lawyers where the Supreme Court exercises all powers of government. The present scheme of regulating lawyers, notwithstanding any justification, is unconstitutional under both the Utah and United States Constitution.

CONCLUSION

The Bar and district court violated the strict time limitations imposed on them by Rule 25, RLDD. For violation of Rule 25, Appellant urges the Court to remand to the district court with instructions to immediately review the Petition and enters his ruling based on the assertions of the Verified Petition without a hearing. In ruling on the

Petition, and under the circumstances of the imposition by the Bar and committee of the wrong rules, the district court must abate the requirements for taking and passing the Bar exams and abate the requirement for recommendation by the committee. Alternatively, and based on the violation of Appellant's Equal Protection and Due Process rights under both the Utah and United States constitutions, the Court should order Appellant's immediately reinstatement.

Respectfully submitted this 11th day of October, 2002.

A. Paul Schwenke, Pro Se
Petitioner/Appellant

ADDENDUM

An addendum is not necessary.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2002, I hand-delivered a true and correct copy of the foregoing Brief of Appellant to Ms. Kate A. Toomey, attorney for the OPC, Utah State Bar at 645 S 200 E, SLC, UT 84111.